IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.905 OF 1990

1. Shri Baban Govind Tope,]
   age 30 years, Occupation :]
   agriculture,]
2. Shri Baban Ganubhau Tope]
   age 35 years, Occupation :]
   service.]
3. Shri Balu Maruti Tope]
   age 25 years, Occupation :]
   agriculture.]
4. Shri Rajaram Kisan Tope]
   age 22 years, Occupation :]
   agriculture.]
   All residing at Waki Budruk]
   Taluka Khed, Dist. Pune] ... Appellants.

versus

1. The State of Maharashtra]
   at the instance of Inspector]
   of Police, Chakan Police]
   Station, Dist. Pune.]
2. Shrimati Gangubai Babusha]
   Tope, residing at Waki Budruk]

Taluka Khed, District Pune] ... Respondents

Mr.A.S.Khandeparkar with Mr.Mohan P.Tekavde, Mrs.Swati M. Tekavde and Miss.Suvidya Vardekar for the appellants.

Mr.V.B.Konde-Deshmukh, APP, for the State

WITH

CRIMINAL APPEAL NO.134 OF 1991

State of Maharashtra] Appellant

versus

1. Shri Baban Govind Tope,]
   age 30 years, Occupation :]
   agriculture,]
2. Shri Baban Ganubhau Tope]
   age 35 years, Occupation :]
   service.]
3. Shri Balu Maruti Tope]
   age 25 years, Occupation :]
   agriculture.]
4. Shri Rajaram Kisan Tope]
   age 22 years, Occupation :]
   agriculture.]
   All residing at Waki Budruk]

Taluka Khed, Dist. Pune] ...Respondents.

Mr.V.B.Konde-Deshmukh, APP, for the State.
Mr.A.S.Khandeparkar with Mr.Mohan P.Tekavde, Mrs.Swati M. Tekavde and Miss.Suvidya Vardekar for the Respondents.

CORAM : D.G.DESHPANDE
S.R.SATHE, JJ.
DATED : MARCH 22, 2007.

JUDGMENT [IN CHAMBER] [PER D.G.DESHPANDE,J]

1. Heard learned APP Mr.V.B.Konde-Deshmukh for the State and learned advocate Mr.Khandeparkar for the accused.

2. Criminal Appeal No.905 of 1990 is filed by the accused against their conviction under Section 376(2)(g) of the Indian Penal Code by which they were sentenced to suffer R.I. for three and half years each and fine. Criminal Appeal No.134 of 1991 is filed by the State for enhancement of sentence of the accused.

3. The case of prosecution, which culminated

in conviction of accused, is as under:-

. Victim in this case is one Sou.Gangubai Babusha Tope - a married woman having three children. She resides at Waki Budruk, Tal.Khed with her husband and three children. All the accused are of the same village. They are Bhaubands of the victim.

4. Incident of alleged rape occurred on 21/4/1990. On that day, the husband of victim had gone to Sassoon Hospital, Pune where his cousin was admitted. On the date of incident Gangubai had gone to market i.e. Chakan Bazaar at 3.00 p.m. After finishing her marketing, she was waiting near the cattle market for some vehicle to give her lift. She saw a truck of accused No.3. She stopped it. All the accused were sitting in the cabin. There were two labourers sitting in the back side of truck. Accused No.3 gave her lift and picked her and she sat in the cabin of truck. When the truck came near bus stop of Bhan, she requested them to stop the truck. But the accused did not stop the truck and they took the truck to river Kathapur.

There within 1 or 2 hours the truck was filled with sand of river Kathapur and then the truck started towards Waki village. There was a water stream or Odha near Waki village. The truck was stopped there and at that place, according to the complainant, all the accused lifted her, took her to the bushes of the said water stream and thereafter accused No.1 made her to fall on ground, gagged her mouth by cap and then all the four accused committed rape upon her in succession without her consent and will. Then the accused brought her to the road side and kept her there and thereafter the accused went with their truck.

5. According to the prosecutrix, a jeep of one Dagdu Vithoba Tope was coming. Tanubai Tope, the wife of Dagdu Tope, was there in the jeep. They saw that the prosecutrix was lying there. Therefore, Dagdu Tope stopped the jeep and Gangubai was taken in the jeep. When she was alleged to have narrated the incident to them i.e. Dagdu and Tanubai, then she was dropped to her house.

6. Next day Gangubai took Tanubai with her.

They went to police station and lodged complaint (Exh 17). Offence was registered against all the accused. Gangubai was sent for medical examination. Her clothes were seized. The accused were arrested. Their clothes also came to be seized. Samples of blood and pubic hair were taken. Panchanama of seen of offence was drawn. All the muddemal property was sent to the Chemical Analyser and after receiving report from the C.A. a charge sheet came to be filed.

7. The defence of accused was of total denial and false implication.

8. Six witnesses were examined. The trial Court found the accused guilty of gang rape, but sentenced them to three and half years and, therefore, the State has filed its appeal for enhancement of sentence and the accused have filed their appeal for challenging their conviction.

9. The learned advocate for the accused urged that the story given by the prosecutrix is highly impossible and improbable; the conduct of Gangubai was most unnatural; there is no

examination of independent witnesses; medical evidence did not support the case of rape; the clothes of accused did not exhibit any sign of accused having intercourse with Gangubai and, therefore, the conviction of the accused was totally wrong and they were entitled for acquittal.

10. On the other hand the learned APP for the State contended that Gangubai had no reason to falsely implicate the accused, her evidence was corroborated by the evidence of Tanubai and also by medical evidence. He also contended that there was nothing abnormal or unnatural in the conduct of Gangubai and, therefore, the conviction of accused did not call for any interference. The learned APP, however, contended that since it was a case of gang rape, the sentence awarded by the trial Court was totally inadequate and against the provisions of law and, therefore, the sentence was liable to be enhanced.

11. The important aspect of this case is that the fate of all the four accused hangs on the testimonies of Gangubai - the victim; Tanubai -

the witness and the medical evidence.

12. First criticism that was levelled by the advocate for the accused on the prosecution case was that there was inordinate delay in lodging the FIR and the version of Gangubai did not match with the versions of the Investigating Officer and Tanubai (PW 4). According to Gangubai the incident occurred at about 11 ‘O’ clock on the night of 20/4/90. She was brought home by Dagdu and Tanubai (PW 4). Then on the next day morning, she went to the house of Tanubai, brought Tanubai to her house and, then went to Chakan Police Station where the report was lodged. In her cross examination Gangubai admitted that she and Tanubai reached Chakan at 11.00 a.m. on 21/4/90 and then directly went to the police station and lodged the complaint and she returned home at about 4.00 p.m. Tanubai (PW.4) in her cross examination has stated that she reached Chakan Police Station between 11.00 a.m. and 12.00 noon. Her statement was recorded at 12 ‘O’ clock and the complaint was recorded prior to that.

13. It will be clear, therefore, that as per

the evidence of Gangubai - the victim and Tanubai (PW 4), the FIR was registered at 11 ‘O’ clock. But the facts depicted in the FIR and the evidence of Investigating Officer reveal something else. P.W.6 Sushil Kadam - Police Sub-Inspector, Chakan, has stated that he took down the complaint of Gangubai on 22/4/90 vide Exhibit 17. In his cross examination, he has stated that the prosecutrix had come to the police station at about 4.30 p.m. and then he recorded the FIR. This evidence of Investigating Officer, which is consistent with the record and entries made by him, is totally contradictory to the versions of Gangubai and Tanubai. Because, according to Gangubai - victim and Tanubai (PW 4), the FIR was lodged at 11 ‘O’ clock, whereas according to PSI Kadam - the IO, they came to the police station at 4.30 p.m., then the complaint was taken down and thereafter statement of Tanubai was recorded.

14. Between the oral versions of Gangubai and Tanubai and, the evidence of PSI Kadam, we will have to accept the evidence of PSI Kadam, because he has recorded the FIR after putting timing there upon. In such eventuality, there is no

explanation from Gangubai and Tanubai why firstly they are telling lie about the time of lodging the FIR and secondly what they were doing up to 4 'O' clock and why earlier they had not gone to lodge the complaint to the police station. As per the noting at Exhibit 17 made by P.W. 6 PSI Kadam, the incident had occurred on 21/4/90 at 21.00 hours and FIR was registered at 22/4/90 at 17.00 hours. Therefore, the evidence of P.W.6 that Gangubai and Tanubai came there at 4.30 p.m. and then the incident was narrated and the FIR was registered at 5 'O' clock has to be accepted as against the testimonies of Gangubai and Tanubai. This also further gets supported from the fact that Gangubai in her cross examination has admitted that after lodging Exhibit 17, she showed spot of incident to the police and the panchanama was drawn. This panchanama is at Exhibit 13. Timing of the panchanama is sought to be proved by the prosecution through P.W.1 who turn hostile but admitted his signature on Exhibit 13. The panchanama was commenced at 17.30 hours and completed at 18.00 hours. It is now therefore crystal clear that Gangubai and Tanubai went to the police station at or around 4.00 or 4.30 in the after noon, then FIR was

taken down, offence was registered at 17.00 hours and then panchanama of scene of offence was prepared at 17.30 or 18.00 hours.

15. As per Dr.Priya Pardeshi (PW 5), Gangubai was referred to Sassoon Hospital for examination on 23/4/1990 at 00-45 hours. From this timing it will be clear that the alleged rape took place on 21/4/90 at 9.00 p.m., the FIR was lodged on 22/4/90 at 5 'O' clock and after 7 hours, Gangubai was sent to Sassoon Hospital for examination.

16. Let us now consider the story given by Gangubai with reference to the criticism levelled by the advocate for the accused that the story is full of exaggeration, improbabality and lies. Firstly, according to the advocate for accused, even if, according to Gangubai her husband had gone to see one of his relative at Sassoon Hospital but when Gangubai herself was sent for medical examination at Sassoon Hospital, she did not make any effort or attempt to contact her husband to narrate this horrible incident to him. Secondly, according to the advocate for accused, there was no corroboration to the story of

Gangubai that she had gone for marketing at Chakan Bazaar from 3.00 p.m. onwards on 21/4/90 and, there was no proof at all as to what she had purchased or sold and what she was doing in the market from 3.00 p.m. to 7.00 p.m. or so, what were her belongings; how much money was with her; whether she was carrying any purse etc and what happened to those all items while all the accused committed rape upon her. The advocate for the accused also pointed out that according to Gangubai even though four accused in succession committed rape upon her, even her bangles were not broken in the incident. This is highly improbable and falsifies the story of rape. Further according them, there is vast difference between the story given by Tanubai and Gangubai as to where, how and in what condition Gangubai was found. According to Gangubai, after the rape she was brought to the side of road by the accused, she was sitting on the road, she saw the jeep of Dagdu coming and she stopped the jeep and she was given lift by Dagdu and Tanubai. Whereas according to Tanubai (PW 4), while she was coming with her husband Dagdu in the jeep, she saw a woman lying near the stream, she requested her husband and then the prosecutrix

(Gangubai), who was unconscious, was taken in the jeep.

17. Further, according to defence, even regarding narration of incident to Tanubai, there is great variance in the story of Tanubai and Gangubai. This certainly creates strong doubt about veracity of both the witnesses. In order to appreciate this, We will have to go to the evidence of Gangubai and Tanubai. The story given by Gangubai shows that she had gone for marking at 3 ‘O’ clock at Chakan, within two hours her marketing was over and she was waiting for bus, at that time a truck came and she was given lift and the rape was committed upon her at or around 9 ‘O’ clock. So she was with the accused for more than four hours in any case. Then the accused took the truck firstly to Kathapur river. The truck was filled with sand. There were only two labourers and it took them two hours to fill the truck. In fact if two labourers are there, then one has to dig out the sand, fill it in iron container (i.e. Ghamela) and it has to be handed over to other labour in the truck who will dump it in the truck and again go on getting Ghamela filled with sand. For two

labourers it would require minimum four hours in any case to fill the truck. Therefore, in any case Gangubai was with the accused at Kathapur river from 5 p.m. till 9 or 10 ‘O’ clock in the night i.e. for more than 4/5 hours. But she does not say that during this 4/5 hours any of the accused misbehaved with her in any manner whatsoever. She does not say that while the truck was being filled with sand, any attempt was made by the accused. She does not say that any attempt was made by her to run away from the spot. There is no explanation why she did not try to escape from the spot during the dark hours in the night when the labourers were filling the truck. Thereafter she alleged that after the truck was filled with sand, it was brought near village Waki and near water stream it was stopped and rape was committed upon her.

18. This appears to be highly unnatural. Though there is nothing on record, it can be assume that Kathapur river, where the truck was initially stopped and sand was filled in it, is at a farther distance from village Waki than it was from the water stream. If at all the accused wanted to commit rape upon her, they would have

chosen a place that was more secluded and away from village Waki. Even as per the evidence of Gangubai, the water stream where the rape was committed is at 200 ft. from her village.

19. It is, therefore, highly doubtful that the accused in stead of committing rape upon her at or near Kathapur river, would commit rape near water stream which was only 200 ft. away from Gangubai's village, in fact, while the labourers were filling the sand, all the accused had ample opportunity to commit rape.

20. According to Gangubai when the truck was stopped near water stream all the accused lifted her and took her to water stream i.e. to the bushes of the said water stream and she was made to fall on the ground where the rape was committed. It is to be noted here that unfortunately for the accused the cross examination of the witnesses is absolutely disappointing. Many important aspects of the matter have been left untouched and they have not been probed by searching cross examination. According to Gangubai the rape was not committed

in the bed of Odha where the sand was seen, but it was committed on the west side of brook i.e. Odha. It is common knowledge that the shores of such small brooks or Odha are away, surrounding with stormy shrubs and having sandy and rough surface. Very rarely any place can be as smooth as cushion or mattresses. It is surprisingly enough when four persons in succession committed rape upon Gangubai, not a single scratch or injury was seen on her back, buttocks or any part of her body as a result of rubbing on the rough surface. Dr.Priya Pardeshi admitted in her cross examination that there were no abrasions or injuries on the back of the prosecutrix and she did not apply any ointment on the back of the prosecutrix. This is totally contradictory to the version of Gangubai wherein she has stated that there were abrasions on her back and she had shown two abrasions to the doctor and the doctor applied ointments to those abrasions. Further Gangubai admitted in cross examination that her bangles were not broken in the incident. This is most unnatural thing to happen. It may be that in a gang rape the victim may not put up stiff resistance but when Gangubai does not say that the accused had given her threats or she had any

apprehension of death or serious injury at the hands of accused, if she had resisted or; that the accused were armed with at that time and that had dissuaded her from making hue and cry then ordinarily a married woman having three children is supposed to put up minimum resistance. Not breaking of bangles in such a situation creates serious doubt about the whole testimony of victim. Gangubai does not say that any of the accused while committing rape utter any word of threat or coerced her or frightened her and, therefore, when the rape was committed on rough surface, least resistance would have resulted in breaking of bangles and, therefore, the testimony of Gangubai is required to be accepted with caution and care which is not reflected in the judgment of the trial Court.

21. It has to be mentioned specifically at this juncture that Gangubai in para 7 of her cross examination has clearly admitted that the place of incident is sandy and rough. Therefore, absence of any kind of injury any where on her body (excepting those some injuries noted on the private part of Gangubai) and not breaking of bangles; no injury to any of the accused i.e.

scratch by nail or bitting, create strong doubt about the truthfulness of the story given by the prosecutrix.

22. Further according to Gangubai she could not raised cries as her mouth was gagged with cap. If that was so, the gagging must have continued while the accused raped her in succession. She does not say as to what happened to the cap after the rape by all the accused was over. Whether the accused carried that cap with them or it was left at the place.

23. In her evidence Gangubai has stated that her brother in law Yashwant Khandu Tope was ill and was admitted in Sassoon Hospital, Pune and hence her husband was with him. She has also stated that she was sent to Sassoon Hospital for medical examination and she was accordingly examined there and admitted in the hospital for two days. But in the same breath she says that after two days her husband came to see her in the Sassoon Hospital and then she narrated the incident to him.

24. This conduct of Gangubai also appears to be most unnatural. A married woman, having three children, like Gangubai, would have done everything possible firstly to fetch her husband at Sassoon hospital where her husband had gone; would have narrated the incident to him and then she would have lodged report to the police. Even if for the sake of arguments it is accepted that Gangubai was not required to wait till she saw her husband, then when she was sent for medical examination at Sassoon hospital, she would have tried to contact her husband first in the hospital before she was medically examined. But she did nothing of that sorts for two days and according to her, her husband came to see her after two days of her admission in the hospital and then she narrated the incident to him. All this conduct of Gangubai creates further strong doubt about the entire story of the prosecutrix.

25. The next part of the story of Gangubai is about narration to Tanubai (PW 4). According to Gangubai after committing rape, the accused brought her to the side of road, kept her there and they went away along with truck. She also

stated that the labourers who had filled the truck with sand at Kathapur river were in the truck when the incident had occurred. If this is so, then this is a case where two independent witnesses were available to the police. But no attempt whatsoever was made by the IO to trace or locate those labourers and get their statements recorded. No attempts were made to trace out the truck by which the accused gave lift to Gangubai and in which the sand was filled and what happened to that truck thereafter. All those pieces of evidence if collected, they would have definitely laid strong corroboration to the story of prosecutrix. Therefore, firstly, there is nothing on record to show that Gangubai had been to market i.e. Chakan Bazaar from 3 pm onwards; that she did any marketing; that the accused owned any truck or that they had hired any truck or they were doing business of collecting sand and selling it or that on that day they had hired somebody-elses truck with labourers for collection of sand and the sand was actually collected from Kathapur river, that there were two or more labourers doing the job of filling the sand. Gangubai does not say that any of the accused helped the labourers in filling the sand.

If that was so, there is no explanation as to what was necessity for all the four accused to go for collecting sand. Either all these important pieces of evidence are left untouched by the investigating agency deliberately or even investigating agency did not believe the story of Gangubai and, therefore no investigation was made in this regard.

26. Therefore, Gangubai says that after she was dropped on road, she was waiting there. When Dagdu and his wife Tanubai came there in a jeep, Gangubai stopped their jeep and then they dropped her to her house. In the mean time she told the incident to Tanubai. After coming home, Gangubai did not narrate the incident to anybody. On the next day, she went to the house of Tanubai, brought her to her house and asked her to accompany her to the police station for lodging complaint. In the cross examination Gangubai has stated in para 6 that on the next day, at about 8.00 a.m., she went to the house of Tanubai, Dagdu was not present in the house. She then told the incident to Tanubai. In her cross examination Gangubai also admitted that Dagdu lives in the same Wada where Gangubai lives.

Tanubai (PW 4) on the other hand in her evidence has stated that she was going in the jeep with her husband for bringing cigarette. They were going to Waki Village. Her husband was driving the jeep and when they were passing by road, they saw one woman lying near the stream. It was near the small bridge of the stream. The prosecutrix Gangubai was unconscious. Therefore, Tanubai - a woman of 45 years, got down from the jeep and took Gangubai in her jeep. She had no talk with Gangubai at that time. On the next day, Gangubai sent her son to Tanubai to request Tanubai to come to Chakan along with her and, therefore, she had gone with Gangubai at Chakan and "Gangubai had told nothing". However, this witness Tanubai changed her stand completely in the examination-in-chief itself and stated before the Court that Gangubai had told when she was taken in the jeep that the accused had committed sexual intercourse with her forcibly. Unfortunately even in respect of this major and material improvement, the defence did not at all cross examine Tanubai. But one thing is certain that according to Tanubai, Gangubai was unconscious and she took Gangubai in the jeep. Whereas according to Gangubai she had stopped the jeep

and asked them to give her lift up to her house. Ordinarily this would not have a major contradiction or variance, but looking to over all evidence of Gangubai and Tanubai and the different points discussed by us, this is a major and material contradiction in the evidence of Gangubai and Tanubai.

27. The most important thing is that if Gangubai had narrated the incident of rape to Tanubai while she was in the jeep, then Dagdu, the husband of Tanubai, also becomes an important witness for prosecution. But he has not been examined by the prosecution. In fact, according to the story given by Tanubai to the police in her statement, Gangubai, Tanubai and Dagdu all had come to the police. But this fact was clearly denied by Tanubai before the Court. She admitted that she had not stated to the police during her statement that Gangubai was brought to the police by Tanubai and her husband Dagdu. She could not explain why portion marked ‘A’ came to be recorded. It is pertinent to note that name of Gangubai’s husband is Babusha Tope and name of P.W.4 is Tanubai Tope, the accused are also Tope and, if the accused are Bhaubands of Gangubai,

then P.W.4 and her husband Dagdu are also Bhaubands. In this regard, i.e. regarding the conduct of Gangubai, it is pertinent to note that in her cross examination in para 5, she had admitted that she had four real brothers-in-law Arjun, Yashwant, Bajirao and Balwant. She is on good with them. They all are married. She had no quarrels with them and they reside near her house. If that is so, and even Gangubai's husband was not in the house at that time, then there is no explanation why Gangubai did not narrate the incident of rape to any of them, i.e. to her brothers-in-law, from the time she reached home after being dropped by Dagdu and Tanubai, till 4 'O' clock on the next day when she left with Tanubai for going to police.

28. If Dagdu had accompanied Gangubai and Tanubai to the police station, and if Tanubai had shown courage to deny this fact, denial is for obvious reason and/or with some motive and the motive appears to be to falsely implicate the accused in such a serious crime. In any case, Tanubai is highly interested witness and, therefore, non-examination of two labourers during investigation by the investigating agency

assumes great importance and creates strong doubt about the case. If the independent witnesses are not there, then question is different. But when, from the story given by Gangubai, presence of independent witnesses in such a case of rape is there, then it was absolutely necessary for the investigating agency to find out those witnesses' and record their statements. Non-examination of Dagdu also creates strong doubt. Because, according to IO - PSI Kadam (PW 6) statement of Dagdu came to be recorded on 22/4/1990 at 7.30 p.m. We had observed earlier that the police did not try to find out or locate two labourers, but it appears that P.W.5 PSI Kadam had recorded the statements of Balu Sitaram Shelke and Ravindra Shankar Waghmare who were coolies on the said truck. If that is so, then non-examination of these two labourers not only creates strong doubt about the prosecution case but it requires the court to draw adverse inference against the prosecution. The Investigating Officer or the prosecutrix has not given any satisfactory reason as to why these two labourers could not be or were not examined by the prosecution.

29. The learned APP, however, in spite of all

these strong doubtful circumstances in the prosecution case, contended that if the medical evidence supports the story of prosecutrix, then no further corroboration is necessary. He, also, contended that there is no reason for any woman to falsely implicate the accused in such a crime of gang rape which involves her own reputation and chastity. On the other hand learned advocate for the accused contended that firstly the medical evidence does not conclusively prove that there was rape, at any rate as gang rape, and secondly if the ocular evidence is found to be grilled with number of loopholes, then the medical evidence could not be relied upon for convicting the accused. Dr.Priya Pardeshi (PW 5) has stated in her evidence that the prosecutrix was referred to her for examination on 23/4/1990 at 00-45 a.m. She gave history of rape by four persons on 21/4/90 at 9.00 p.m. The doctor (PW 5) then examined her and found small mark of laceration of 2 cm. odema was present on the libia manora, two small ulcers 1 cm. round at 5 ‘O’ clock and 7 ‘O’ clock. position, the hymen showed old tears, fourchette. Perneum and Cervix were healthy. There was no vaginal bleeding or discharge. The pubic hair were scanty and not

matted with semen. The doctor collected pubic hair, blood bottles for grouping, vaginal smear and vaginal swab. In her opinion, the prosecutrix was habituated to intercourse and she issued the certificate (Exhibit 20). She then opined that small mark of laceration can be a mark of forcible intercourse. In the cross examination, the doctor, however, admitted that there were no abrasions or injuries on the back of the prosecutrix. She did not apply any ointment on the back of the lady. Lacerations in libia minor can be caused by scratches or normal intercourse. She admitted that there was possibility of semen stains when there is intercourse with 3/4 persons. Male pubic hair were not found. Then she admitted that when no semen and pubic hair is found, then it could not be said that there was habitual intercourse. She also admitted that there is possibility of injury even if she has intercourse with her husband.

30. It is clear from the evidence of this witness (PW 5) that her cross examination has taken away the force of the evidence. Because the doctor has admitted that lacerations in libia minora can be caused by scratches or normal

intercourse and ulcers can be caused by V.D. (Verneral Diseases). Her further admission that if the intercourse is committed by 3/4 persons, possibility of semen stains is there. Her further admission that when if no semen or pubic hair is found, then it could not be said that it is forcible intercourse. These admissions not only nullify but do dilute the case of the prosecution. The medical evidence does not conclusively prove the case of rape. But injuries could be possible for the reasons given by the doctor (PW 5).

31. Though, it did not strike the advocate for the accused before us or before the trial Court that Dr.Priya Pardeshi (PW 5) has not given the name of complainant in her evidence, it is necessary to mention here what she has stated in her evidence. She has stated that "the prosecutrix was referred to her". There is nothing on record to show that on the date on which the P.W.5 was examined in court, the prosecutrix Gangubai was present. She did not identify Gangubai as the same lady whom she had examined in Sassoon Hospital. This may be a mistake on the part of the prosecution. But the

fact remains that in her oral testimony before the Court, Dr.Priya Pardeshi (PW 5) has not given the name of prosecutrix Gangubai nor has identified her in the Court.

32. The prosecution then tried to rely upon the report of the Chemical Analyser regarding the clothes of the prosecutrix and the clothes of the accused. For proving those panchanama the prosecution has examined P.W.2 Dilip Raut. He is the witness on both the panchanamas viz. the panchanama of clothes of prosecutrix and the panchanama of clothes of accused. First Panchanama is at Exhibit 11 and panchanama of clothes of accused is at Exhibit 15. He also identified the articles as per panchanama (Exhibit 11). One yellow colour printed saree having white-red stains at places and one bluish blouse were recovered from Gangubai. Then as per Exhibit 15, which is the panchanama of clothes of accused, a Payjama, a shirt, a cap and yellow underwear were recovered from accused Baban Govind Tope. Then a Payjama, a shirt and one blue underwear were recovered from accused Baban Genbhau Tope. Then from accused Balu Maruti Tope one Payjama, a shirt, green underwear were

recovered and from accused Rajaram Kisan Tope, a Payjama, a bluish shirt and one brownish underwear were recovered. Out of these articles, as per panchanama (Exhibit 15) yellow underwear of accused Baban Govind Tope had whitish stains at two places, the payjama of accused Babu Maruti Tope had small big reddish stains and on the payjama of accused Rajaram Tope reddish stains were found. The C.A. report of these clothes of the victim as well as the accused is at Exhibit 25. There are number of semen stains on the saree of victim. Out of 15 items, no semen was detected on Item Nos.2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13 and 14; No blood was detected on Item Nos.1, 2, 3, 4, 6, 9, 12, 14, 15. Blood detected on Item Nos.5, 7, 8, 10, 11 and 13 is human and even the blood grouping and semen grouping was done. Regarding this incriminating piece of evidence in the form of C.A report, the contention of the learned advocate for the accused was that all the accused are married, the incident had taken place on the night of 20/4/90 and they came to be arrested on 22/4/90. Therefore, the presence or absence of semen or blood on their clothes cannot be a proof of rape. We find strong force in the submission of the

accused.

33. Considering therefore all these circumstances, this is a clear case of failure of prosecution to prove the guilt of accused beyond reasonable doubt. The trial Court has, however, found the accused guilty being incluenced by the fact that there is no reason for the prosecutrix to falsely implicate the accused who are her Bhaubands belonging to same village. In our opinion this approach of the trial court is totally wrong. The reasons for false implication apart, the first thing that the prosecution has to do is, to produce the evidence before the Court which is worthy of credence, bring its case beyond reasonable doubt and, then the accused can be questioned as to why they would be falsely implicated by the prosecutrix. If the story of the prosecutrix is full of loopholes, doubtful and suspicious, then the accused need not answer this query as to why the prosecutrix would falsely implicate them.

34. It is true that if the evidence of prosecutrix is found trustworthy, it can be made

basis for conviction without corroboration by independent witness . But this is not the case of that type for all the reasons stated and discussed above. For all these reasons, we pass the following order :-

ORDER

The appeal filed by the State vide Criminal Appeal No.134 of 1991 for enhancement of sentence is dismissed.

The appeal filed by the accused vide Criminal Appeal No.905 of 1990 is allowed. The conviction of the accused under Section 376 (2)(g) of the Indian Penal Code is set aside. They are acquitted of all the charges levelled against them.

All the accused are on bail. Their bail bonds stand cancelled. If they have paid fine, the same should be returned to them.

[D.G.DESHPANDE,J]

[S.R.SATHE, J]